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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 513

RAYMOND D. BROWN,

Petitioner,

vs.

DREW CHEMICAL CORPORATION
(formerly E. F. Drew & Co., Inc.),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

	PAGE
CONSTITUTIONAL AMENDMENTS AND STATE STATUTES INVOLVED	1
QUESTIONS PRESENTED	3
COUNTERSTATEMENT OF THE CASE	4
ARGUMENT:	
THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WHICH WOULD SUPPORT THE EXERCISE OF THE COURT'S DISCRETION IN FAVOR OF ISSUING A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION	7
A. A provision in a state statute dispensing with a strict application of the rules of evidence in administrative proceedings brought thereunder does not violate the due process clause of the Fourteenth Amendment to the United States Constitution	7
B. The Court lacks jurisdiction to review the judgment below since it was based upon independent non-federal grounds, which, standing alone, were adequate to sustain its entry	12
C. Petitioner's failure to assert a violation of the Thirteenth Amendment below precludes him from urging the issue on this petition	13
D. Petitioner's allegation that the Respondent violated the Thirteenth Amendment does not present a substantial federal question	14
CONCLUSION	15

Table of Cases.

	PAGE
Barsky v. *Board of Regents*, 347 U. S. 442 (1954)	10
Chicago & E. I. R. Co. v. *Industrial Commission of Illinois*, 284 U. S. 296 (1932)	7
Crowell v. *Benson*, 285 U. S. 22 (1932)	11
Dewey v. *Des Moines*, 173 U. S. 193 (1899)	13, 14
Edelman v. *California*, 344 U. S. 357 (1953)	13
Edward Hines Trustees v. *Martin*, 268 U. S. 458 (1925)	14
Hamilton Company v. *Massachusetts*, 73 U. S. (6 Wall.) 632 (1867)	14
Herb v. *Pitcairn*, 324 U. S. 117 (1945)	13
Hodges v. *United States*, 203 U. S. 1 (1906)	14
Morgan v. *United States*, 304 U. S. 1 (1937)	10
Opp Cotton Mills, Inc. v. *Administrator, etc.*, 312 U. S. 126 (1941)	11
Scripto v. *Carson*, 362 U. S. 207 (1960)	11
Trade Commission v. *Cement Institute*, 333 U. S. 683 (1948)	11
Wilson v. *Cook*, 327 U. S. 474 (1946)	14

Table of Constitutional Amendments.

U. S. Const. amend. V	11
U. S. Const. amend. XIII	1; 5, 13
U. S. Const. amend. XIV	5

Table of Statutes.

	PAGE
28 U. S. C. 1257(3)	7, 13
N. J. S. A. 18:25-1	5
N. J. S. A. 18:25-12(c)	9
N. J. S. A. 18:25-12(d)	5
N. J. S. A. 18:25-16	1, 8, 9, 10

Procedural Rules.

Rule 19, United States Supreme Court	9
Rule 40(2), United States Supreme Court	4
Rule 40(3), United States Supreme Court	4
R. R. 1:10-2, New Jersey	7
R. R. 4:12-3, New Jersey	6

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Federal Constitutional Amendments and State Statutes Involved.

U. S. Const. amend. XIII—Slavery Abolished

"SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation."

New Jersey Law Against Discrimination, L. 1945, c. 169, p. 595, §15, N. J. S. A. 18:25-16.

"Practice and procedure.

The case in support of the complaint shall be presented before the commissioner by the attorney for the

division and evidence concerning attempted conciliation shall not be received. The respondent may file a written verified answer to the complaint and appear at such hearing in person or representative, with or without counsel, and submit testimony. In the discretion of the commissioner, the complainant may be allowed to intervene and present testimony in person or by counsel. The commissioner or the complainant shall have the power reasonably and fairly to amend the complaint, and the respondent shall have like power to amend his answer. The commissioner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed."

Questions Presented.

I. SHOULD THIS COURT EXERCISE ITS DISCRETION IN FAVOR OF THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, TO REVIEW A FINAL DETERMINATION OF THAT COURT WHERE THE JUDGMENT ENTERED BELOW WAS IN ACCORDANCE WITH WELL SETTLED FEDERAL CONSTITUTIONAL PRINCIPLES AND WAS BASED UPON STATE LAW, WHICH, WITHOUT REFERENCE TO A FEDERAL QUESTION, WAS SUFFICIENT TO SUPPORT THE ENTRY OF JUDGMENT?

II. SHOULD THIS COURT CONSIDER A FEDERAL QUESTION RAISED FOR THE FIRST TIME ON A PETITION TO IT FOR A WRIT OF CERTIORARI WHERE THE QUESTION URGED IS NOT CONNECTED WITH OR AN ENLARGEMENT OF THE FEDERAL QUESTION RAISED IN THE NEW JERSEY COURTS?

III. DO THE ALLEGATIONS OF THE COMPLAINT ASSERTING A VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION RAISE A SUBSTANTIAL FEDERAL QUESTION WHICH SHOULD BE CONSIDERED BY THIS COURT?

Counterstatement of the Case.

Although the Petitioner's Statement of the Case sets forth a general synopsis of the state of the record of this action as it has progressed through the courts of the State of New Jersey, it contains certain inaccuracies and omissions, the correction and inclusion of which the Respondent considers necessary for a complete determination on this application for a writ of certiorari. Accordingly, the following Counterstatement of the Case is submitted pursuant to the provisions of *Rule 40(3)*. Inasmuch as the record below has been submitted to this Court by the Petitioner in the form of appendices, the Respondent, in order to comply as closely as possible to *Rule 40(2)*, shall make all references to the Petitioner's appendix below as *Pa(1)*, while references to the Petitioner's appendix to the pending petition shall be designated as *Pa(2)*. References to Respondent's appendix below will be designated as *Ra*.

The Petitioner herein originally commenced his action in the Superior Court of New Jersey, Law Division, Morris County on September 4, 1962, to recover damages in the nature of unpaid wages which he claimed were due to him from his employer, the Respondent, from April 13, 1955, the date of his hiring, until May 8, 1962, the date upon which the Respondent terminated his employment. He also sought damages for his alleged wrongful dismissal by the Respondent.

In his verified complaint, he alleged that he was hired by the Respondent on April 13, 1955, to perform the duties of a position which was designated by the Respondent as a "Sample Filler" (P1a(1)). It was further alleged that shortly after entering into the position for which he was hired, the Petitioner became "aware" that the Respondent had "mis-classified" (sic) his position (P1a(1)), this

awareness presumably being predicated upon the fact that some of his duties as a "Sample Filler" were also required duties in positions to which the Respondent had assigned a higher job classification and a corresponding higher rate of compensation (P1a(1)). The complaint asserted that because of the apparent overlapping of some of these duties, the Petitioner was entitled to compensation, not at the wage rate offered to and accepted by him at the time of his hiring, but at a higher rate of pay which corresponded to a position, the execution of the duties of which he was not hired to perform (P1a(1)). The Respondent's refusal to agree to Petitioner's demands for payment of the higher wage rate was alleged to have been discriminatory and in violation of the New Jersey *Law Against Discrimination, L. 1945, c. 169, p. 589, §1, N. J. S. A. 18:25-1 et seq.* (P2a(1)), notwithstanding the fact that in the complaint itself the Petitioner's entitlement to the increment was asserted merely "as a matter of principle" (P2a(1)).

In addition to the foregoing, the Petitioner claimed that he was dismissed from his employment as a result of his threat to file a civil action against the Respondent if his demands for increased wages were not met, (P3a(2)). It was contended that this dismissal was wrongful and constituted a violation of *N. J. S. A. 18:25-12(d)*. It was not asserted in the complaint, nor was it asserted at any time prior to the petition now pending, that the Petitioner's rights under the Thirteenth Amendment to the Federal Constitution, *U. S. Const. Amend. XIII, §1*, had been violated. Similarly, the record below is devoid of the suggestion now made by the Petitioner that he was required under "threat of dismissal" to work for the Respondent (Pet. 4). This allegation is here raised for the first time.

Subsequent to the filing of the complaint, and before filing an answering pleading, the Respondent moved under

the provisions of the New Jersey Procedural Rule *R. R. 4:12-3* for dismissal of the complaint and for the entry of judgment in its favor on the grounds that the Petitioner had failed to state a claim for which relief could be granted. In support of its motion, the Respondent asserted that the allegations contained in the complaint did not disclose any violation of the New Jersey *Law Against Discrimination, supra*, did not state a cause of action for breach of contract, and, further, assuming the sufficiency of the allegations, that the Petitioner had failed to exhaust the administrative remedies provided for in the Act itself. The trial court entered judgment in favor of the Respondent (R2a) and on November 29, 1962, the Petitioner filed an appeal of the trial court's Order of Judgment with the Superior Court of New Jersey, Appellate Division (P23a(1)).

Pending argument in the Appellate Division, the Petitioner filed an application in the Supreme Court of New Jersey for a writ of certification. This petition was denied without formal opinion on March 25, 1963 (R3a). Thereafter, the Appellate Division, in an unreported written opinion dated May 13, 1963, affirmed the trial court's dismissal of the action and held that as a matter of state law the Petitioner had failed to set forth a cause of action for breach of contract (P46a(1)). In addition, it construed the language of the *Law Against Discrimination* and concluded that the Petitioner's complaint failed to set forth any facts which, even if accepted as true, constituted a violation of the express provisions of that statute (P46a, 47a(1)). It further concluded that even if it was assumed that the Petitioner adequately alleged one or more violations of the Act, he had failed to exhaust the administrative remedies specifically provided for therein (P47a(1)).

After the Appellate Division's determination, the Petitioner again applied to the Supreme Court of New Jersey for a writ of certification, and by virtue of the entry of an order on July 1, 1963, this second application was denied, also without opinion (P6a(2)). This case is presently before this Court on the Petitioner's application for a writ of certiorari to the Supreme Court of New Jersey.

ARGUMENT.

POINT ONE.

The petition does not present a substantial federal question which would support the exercise of the Court's discretion in favor of issuing a writ of certiorari to the Superior Court of New Jersey, Appellate Division.

A.

A provision in a state statute dispensing with a strict application of the rules of evidence in administrative proceedings brought thereunder does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

As the Respondent views the record, the writ here sought by the Petitioner would, if granted, be more appropriately directed to the Superior Court of New Jersey, Appellate Division, rather than to the Supreme Court of New Jersey, since the latter court, in accordance with its rules of procedure, has exercised its discretion against a review of the decision of the Appellate Division. *28 U. S. C. 1257; Chicago & E. I. R. Co. v. Industrial Commission of Illinois*, 284 U. S. 296 (1932); *N. J. R. R. 1:10-2.* Notwithstanding this, the Respondent will pass this procedural issue and

proceed directly to the merits of the questions presented on this petition.

The primary thrust of the argument advanced by the Petitioner is the unconstitutionality of *L. 1945, c. 169, p. 595, §15, N. J. S. A. 18:25-16;* of the New Jersey *Law Against Discrimination,* which dispenses with the application of the strict rules of evidence in administrative hearings conducted in accordance with its provisions. He complains that he cannot be required to exhaust the administrative remedies provided for thereunder inasmuch as a strict application of evidentiary rules is required by the due process clause of the Fourteenth Amendment to the Federal Constitution. He asserts, in effect, that the courts of the State of New Jersey cannot constitutionally require him by their decisions to proceed to an administrative hearing prior to obtaining a judicial determination of his grievances, and that their decisions, to the extent that they require an exhaustion of administrative remedies, are ineffectual.

At the outset, the Respondent invites the Court's attention to the fact that the New Jersey courts have judicially determined the Petitioner's case on the merits, albeit adversely to him, without requiring him to first present his complaints before the administrative body set up for that purpose by the statute. Both the Law and Appellate Divisions of the Superior Court have determined that as a matter of state law, the facts alleged in the verified complaint failed to assert a violation of the act upon which the complaint was based (P45-47a(1)), and therefore there was no basis to grant the relief sought. Petitioner apparently fails to recognize this and seeks, in effect, a reversal by this Court of the decisions of the New Jersey courts which construed and applied local law.

The sections of the *Law Against Discrimination* applicable hereto are found in *N. J. S. A. 18:25-12(a)* and *(d)* and *N. J. S. A. 18:25-16*. The former section, subsection (a), states that it is an unlawful employment practice for an employer "... because of the *race, creed, color, national origin, ancestry* or *age* of any individual, or *because of the liability for service in the Armed Forces of the United States*, of any individual ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment"; subsection (d) makes it unlawful for an employer to "discharge, expel or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this act, or because he has filed a complaint, testified, or assisted in any proceeding under this act." *N. J. S. A. 18:25-16*, after providing for a hearing on the complaint of an aggrieved person before the New Jersey Commissioner of Education, and for his appearance thereat at the discretion of the Commissioner, further provides that the Commissioner, during the course of any hearing held on a complaint of violation of the Act, "shall not be bound by the strict rules of evidence prevailing in courts of law or equity". This section of the statute is that which Petitioner presently attacks as being an unconstitutional infringement of his rights under the due process clause of the Fourteenth Amendment.

Rule 19 of the procedural rules of this Court provides that:

> "(1) A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

* * *

Considering first the due process question presented above, and without regard to the extent upon which the New Jersey courts' decisions were based upon state law, it is respectfully submitted that the Petitioner presents nothing of "substance" not heretofore passed upon by this Court, and that those portions of the lower courts' opinions which inferentially upheld the constitutionality of *N. J. S. A. 18:25-16* were clearly decided in accordance with well settled principles.

This Court has long recognized that due process, guaranteed to the citizens of the several states under the Fourteenth Amendment, does not guarantee such citizens any particular form or method of procedure before state administrative agencies. The concept of due process requires that an administrative body, performing a quasi-judicial function, shall observe the rudimentary requirements of fair play, and accordingly, must conduct its activities in such a manner so as to conform to the traditional safeguards against arbitrary action. *Morgan* v. *United States*, 304 U. S. 1 (1937).

In *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954) the Court rejected an attack upon the constitutionality of the New York Education Law, which, having secured to the accused notice, the opportunity to be heard, cross-examine and introduce evidence, contained the provision that in hearings conducted thereunder the hearing agency "shall not be bound by the laws of evidence in the conduct of its proceedings". These provisions of the New York statute

were held to be patently "well within the degree of reasonableness required to constitute due process of law," under the Fourteenth Amendment. Similarly, and with respect to the extent of due process required by the Fifth Amendment, *U. S. Const., amend. V*, the Court long ago settled the question that technical application of the rules of evidence is not required in hearings before federal administrative bodies. *Crowell* v. *Benson*, 285 U. S. 22 (1932); *Opp Cotton Mills, Inc.* v. *Administrator, etc.*, 312 U. S. 126 (1941); *Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948).

In addition to all of the foregoing, it would seem that the question presented here, i. e., the unconstitutionality of requiring the Petitioner to first proceed to a hearing before the appropriate state agency, has been rendered moot by reason of the state courts' judicial determination that he has no grievance upon which that agency could act. Essentially, what Petitioner asks this Court for is a determination that the decisions below are erroneous and should be reversed in favor of his concept of what the law of the State of New Jersey should be. The construction of the New Jersey *Law Against Discrimination* by the courts of that state, and their judgments based upon examination of the facts presented by the complaint in the light of that construction, is controlling here and the decision below is not subject to reversal. *Scripto* v. *Carson*, 362 U. S. 207 (1960).

B.

The Court lacks jurisdiction to review the judgment below since it was based upon independent non-federal grounds which, standing alone, were adequate to sustain its entry.

Respondent submits that the judgment below was based upon adequate state grounds and that this fact is immediately evident from a reading of the record (P45-47a(1)). The Court's attention is invited to the fact that the complaint was dismissed for failure to allege a breach of contract and on the further ground that the acts alleged to have been committed by the Respondent were not forbidden by the *Law Against Discrimination*. If any support is needed to substantiate the correctness of the Appellate Division's determination one need only to look to the Petitioner's brief filed in the Supreme Court of New Jersey in support of his application for certification (which brief has been submitted as part of the record) wherein he unequivocally stated:

> "Admittedly, there is no means for this plaintiff to prove the defendant's motive for their hiring policy . . . ." (p. 4).

He has likewise admitted the insufficiency of his complaint as a matter of state law in the very petition submitted here (Pet.-9, 10).

From the time of its foundation, this Court has adhered to the principle that it will not review judgments of state courts that rest upon adequate and independent state grounds.

> "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and inde-

> pendent ground in state law. Nor will we review one until the fact that it does not do so appears of record." *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), at 128.

Here, since it is obvious from the record that the decision below rested upon state law adequate to support the judgment entered independently of any federal grounds, this Court is without jurisdiction to decide the merits of this petition. *Edelman* v. *California*, 344 U. S. 357 (1953).

C.

Petitioner's failure to assert a violation of the Thirteenth Amendment below precludes him from urging the issue on this petition.

The fifth theory urged by the Petitioner in support of the issuance of a writ of certiorari is that he was required to work for the Respondent against his will in violation of the Thirteenth Amendment to the United States Constitution. *U. S. Const. amend XIII §1*, (Pet.-3, 4). This contention admittedly is raised for the first time on this petition (Pet.-3).

Aside from what the Respondent considers to be a lack of merit in this contention, it submits that failure to raise the question below precludes argument and consideration thereof here.

Respondent recognizes that no particular words are necessary in order to assert a federal question, but it is also aware of the rule that "there must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied upon" by a party. *Dewey* v. *Des Moines*, 173 U. S. 193 (1899).

The Petitioner has assigned *28 U. S. C. 1257(3)* as the basis for the Court's jurisdiction. This statute provides for review by writ of certiorari of final judgments of state

courts where "any title, right, privilege or immunity is specially set up or claimed under the Constitution." A review of the record below discloses that neither the complaint nor any of the pleadings filed in this case below ever intimated or suggested a plea of violation of the Thirteenth Amendment. A claim or right which has never been asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company* v. *Massachusetts*, 73 U. S. (6 Wall.) 632 (1867), and such claim, if never raised or alluded to below, cannot be said to have been decided adversely to a party asserting it here for the first time. *Dewey* v. *Des Moines, supra.* Thus, where, as here, a constitutional issue is presented for the first time not connected with or an enlargement of a federal question actually presented in the state court, the matter is not the subject of argument or consideration on review by this Court. *Wilson* v. *Cook*, 327 U. S. 474 (1946); *Dewey* v. *Des Moines, supra*; *Edward Hines Trustees* v. *Martin*, 268 U. S. 458 (1925).

D.

Petitioner's allegation that the Respondent violated the Thirteenth Amendment does not present a substantial federal question.

Apart from the matters set forth in the foregoing subsection "C", it is respectfully submitted that the Petitioner has nowhere set out any violation by the Respondent of the Thirteenth Amendment to the United States Constitution. The involuntary servitude denounced by that Amendment means a condition of enforced compulsory service of one to another; in essence, it is the involuntary subjection of an individual to a master. *Hodges* v. *United States*, 203 U. S. 1 (1906). Clearly the record itself negates the existence in this case of any such concept.

In the complaint which he filed in the trial court the Petitioner asserted not only a hiring for an agreed wage (P1a), but also his dismissal from this employment. This dismissal he has termed "unlawful" (P4a(1)) and it is because of it that he has sought damages. Furthermore, the pleading itself clearly discloses the actual relationship between the parties when it was asserted that the petitioner was advised by the Respondent's agent that he, the Petitioner, would have to abide by the terms of the hiring arrangement and work "without complaining, if [he] cared to remain with the company" (P1a, 2a(1)). These allegations, it is submitted, are completely incompatible with the idea of an involuntary servitude. The very fact of the institution of this action for damages for an alleged wrongful dismissal makes it clear beyond argument that the Petitioner's continued employment with the Respondent was a voluntary expression of his own desires and that his assertion of a servitude is without foundation.

Conclusion.

For the reasons hereinbefore set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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